

A "retailer maintaining a place of business in Illinois" as defined in 86 Ill. Adm. Code 150.201(i), is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. (This is a GIL).

December 21, 1999

Dear Xxxxx:

This letter is in response to your letter dated October 4, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

As previously discussed with, we respectfully request an opinion regarding the sales and use tax relative to the following factual scenarios:

I. Facts

*Overview*

Our client, a STATE Limited Partnership ('LP'), is a software developer. LP develops software for the sole purpose of licensing the software to other entities (i) in Illinois, (ii) outside the state of Illinois and within the United States, and (iii) outside of the United States. The software is designed to facilitate individual stock trading on various national stock exchanges ('Trading Software'). Typically the Trading Software is licensed to a broker dealer which then allows broker dealer's customer ('End User') to use the Trading Software in one of two manners. The End User may use the Trading Software on a computer terminal located in the broker dealer's office. Alternatively, the End User may download the software from the broker dealer's website or under certain circumstances from LP's website for use in End User's home or office.

LP's offices are in STATE. LP does not have any offices outside of STATE. In addition, LP has no employees other than those located in and working in STATE, except in the limited circumstances discussed below.

*License Agreements*

The license fee relative to the Trading Software is payable by the broker dealer directly to LP. The license fee is a fixed fee

multiplied by the number of times the End User uses the Trading Software to place an order relative to a stock trade. No fee is charged for a canceled order.

The Trading Software is licensed pursuant to a software site license entered into between LP and the broker dealer ('Site License'). The Site License typically has a term of one year subject to termination by either party on **sixty (60)** days notice. The Site License provides that the LP retains ownership of the code for the duration of the Site License and thereafter. Use of the software pursuant to a Site License by an End User must be in the broker dealer's office (i.e., the site) and may not be by or through the Internet.

Under certain circumstances, a broker dealer may enter into an amendment to the standard Site License with LP to permit the End User to use the Trading Software through the Internet. If the broker dealer enters into an Internet Amendment with LP then each End User must enter into a Sub-license Agreement ('Sub-license') with respect to the End User's use of the Trading Software. The Sub-license is executed via point and click method on the Internet.

The software also possesses the capability to supply charts, graphs and analytics ('Analytic Software') to the individual End User. The license fee relative to the Analytic Software is a fixed monthly charge (i) for each work station provided in the broker dealer's office, payable by the broker dealer directly to LP, and (ii) for each End User of the Analytic Software provided to the End User via the Internet, payable by the End User directly to LP.

The Site License Agreement and Internet Amendment (including Sub-license Agreement as Exhibit A to the Internet Amendment) Forms are attached as Exhibits 1 and 2 respectively. It is intended that all of the agreements be enforceable pursuant to the provisions of applicable STATE Law. Any dispute must be determined solely in the State District Court of a specific County in STATE (see **Section 9.02** of Exhibit 1).

#### *Sales, Installation and Technical Support*

Software programs developed by LP are advertised in trade publications or will in the future be advertised in trade publications with national circulation, through direct mail and other multi-media campaigns. LP's contact with customers occurs almost exclusively by telephone, mail and Internet from its offices in STATE. Except in limited circumstances, all software is shipped to the customer's location via common carrier, Internet or personally delivered by an unrelated third party installer who is paid by the customer and is not an agent of LP.

LP provides technical support services from its STATE office to all broker dealer customers relative to the Trading Software and the Analytic Software. This service is not included in the license agreement as a warranty provision. The technical support services are billed monthly on an hourly basis directly to broker dealer. The LP employee will not be acting in a sales capacity (making sales presentations or taking new orders).

#### *Current Tax Treatment*

LP is currently charging, collecting and paying over to the State of STATE sales taxes on all of its software licensing, installation services and technical support fees derived from broker dealers or the End Users.

#### II. Questions:

##### *Nexus for Sales or Use Tax Derived from the License*

##### Trading Software

1. If the LP has no employees in Illinois, is sales or use tax due on license fees relative to the Trading Software pursuant to the Site License if the licensee (broker dealer) is located in Illinois?
2. If the LP has no employees in Illinois, is sales or use tax due on license fees with respect to Trading Software downloaded from a broker dealer's website for use by the End User pursuant to a Sub-license in the End User's home or office, if the Site License relates to the broker dealer's office in Illinois?
3. If the LP has no employees in Illinois, is sales or use tax due on license fees charged to the broker dealer with respect to Trading Software downloaded from LP's website for use by the End User's pursuant to a Sub-license in End User's home or office, if the Site License relates to the broker dealer's office in Illinois?
4. If a broker dealer's office is in Illinois, and the LP has no employees in Illinois, does the fact that broker dealer's customer (i.e., End User) may be located in a state other than broker dealer's office (i.e., broker dealer is providing Trading Software to End User's by the Internet pursuant to an Internet Amendment and Sub-license) make a difference?

##### Analytic Software

5. If the broker dealer is located in Illinois, and the LP has no employees in Illinois, is sales or use tax due on the monthly

fixed dollar license fee paid directly by the End User to LP for use of the Analytic Software, if the End User is located outside of Illinois?

6. If the End User is located in Illinois, and the LP has no employees in Illinois, is sales or use tax due on the monthly fixed dollar license fee paid directly by the broker dealer to LP on behalf of the End User for use of the Analytic Software, if the broker dealer is located outside of Illinois?

*Nexus for Sales and Use Tax Derived from Technical Support*

7. Will sales or use tax be due on separately stated technical support fees charged pursuant to the Site License if the licensee (broker dealer) is located in Illinois, but the work is performed via telephone or Internet by an LP employee based in STATE?

*Nexus for Sales and Use Tax Derived from Installation*

8. Will sales or use tax be due on separately stated fees relative to the installation of the Trading Software on a licensee's (broker dealer's) computer hardware under a Site License if the licensee (broker dealer) is located in Illinois and the work is performed via telephone or the Internet by an LP employee based in STATE?
9. Will sales or use tax be due on installation performed in Illinois under a Site License by an unrelated third party, approved by LP but hired and paid by the licensee?

*Nexus for Sales and Use Tax Derived from Physical Presence in Illinois*

10. In regards to Questions 1 through 9 above, will any answer change (i.e., sales or use tax found to be due) if an LP employee based in STATE, with no authority to propose or negotiate sales:
  - a. **Occasionally** travels to Illinois to provide technical support services for a licensee (broker dealer) located in Illinois pursuant to the Site License?
  - b. **Frequently** travels to Illinois to provide technical support services for a licensee (broker dealer) located in Illinois pursuant to the Site License?
11. In regards to Questions 1 through 9 above, will any answer change (i.e., sales and use tax found to be due) if an LP employee based in STATE, with no authority to propose or negotiate sales:

- a. **Occasionally** travels to Illinois to install Trading Software on a licensee's (broker dealer) computer hardware under a Site License?
  - b. **Frequently** travels to Illinois to install Trading Software on a licensee's (broker dealer) computer hardware under a Site License?
12. In regards to Questions 1 through 9 above, will any answer change (i.e., sales or use tax found to be due) if an LP employee:
- a. **Occasionally** travels to Illinois to solicit customers (sales calls, proposals, etc.) or take sales orders?
  - b. **Frequently** travels to Illinois to solicit customers (sales calls, proposals, etc.) or take sales orders?

*Administration where Sales and Use Tax is Liability Exists*

13. If sales tax liability exists, what are the registration and filing requirements?
14. If sales tax liability does not exist, does LP have any responsibility to collect the use tax on its transactions in Illinois?
- a. If so, what are the registration and filing requirements?
  - b. If no responsibility for collecting use tax exists, can the LP choose to collect the use tax on behalf of the broker dealer or End User?
15. If LP is determined to owe sales or use tax due to its operations in Illinois, can LP voluntarily disclose its failure to register, pay any taxes due and receive a waiver for late fees, penalties, and/or interest under an amnesty program?

We respectfully request your response to the above questions. If you have any questions regarding the factual scenarios or to the questions stated above, please do not hesitate to give us a call. Thank you in advance for your assistance.

In the context of a General Information Letter, the Department is unable to make nexus determinations because the amount of information required to make that determination is often best gathered by an auditor. The following information outlines the principles of nexus. We hope it is helpful to you in determining whether you are responsible to pay tax in Illinois.

An "Illinois Retailer" is one who either accepts purchase orders in the

State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Cause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to Brown's Furniture, Inc. v. Zehnder, (1996), 171 Ill.2d 410.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The Use Tax rate is 6.25%.

Retailers that do not have nexus with Illinois can voluntarily register with the Department for the convenience of their customers. These retailers would collect Use Tax from their customers and remit it to the Department.

Please be informed that the Board of Appeals administers a voluntary disclosure program that can provide for limited liabilities for participants who come forward and disclose their liabilities. Please see the enclosed copy of 86 Ill. Adm. Code 210.126 for information about the voluntary disclosure program. The Board of Appeals can be reached at (312) 814-1607.

Generally, sales of "canned" computer software are taxable retail sales in Illinois. See the enclosed copy of 86 Ill. Adm. Code 130.1935. However, if the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. See Section 130.1935(c).

Custom computer programs or software are prepared to the special order of the customer. The selection of pre-written or canned programs assembled by vendors into software packages does not constitute custom software unless real and substantial changes are made to the programs or creation of program interfacing logic. See Section 130.1935(c)(3).

If transactions for the licensing of computer software meet all of the criteria provided in Section 130.1935(a)(1), neither the transfer of the software or the subsequent software updates will be subject to Retailers' Occupation Tax. A license of software is not a taxable retail sale if:

- A) It is evidenced by a written agreement signed by the licensor and the customer;
- B) It restricts the customer's duplication and use of the software;
- C) It prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party);
- D) The vendor will provide another copy at minimal or no charge if the customer loses or damages the software; and
- E) The customer must destroy or return all copies of the software to the vendor at the end of the license period.

As stated above, licenses of computer software are not taxable if they meet all of the criteria listed in Section 130.1935(a)(1). However, item (D) of that part requires the license to contain a provision requiring the vendor to provide another copy at minimal or no charge if the customer loses or damages the software. The Department has deemed software license agreements to have met this criteria if the agreements do not contain a provision about the loss or damage of the software, but the vendors' records reflect that they have a policy of providing copies of software at minimal or no cost if the customers lose or destroy the software.

Item (E) of this part also requires a license to require a customer to destroy or return all copies of the software to the vendor at the end of the license period. The Department has also deemed perpetual license agreements to qualify for this criteria even though no provision is included in the agreements that requires the return or the destruction of the software.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at [www.revenue.state.il.us](http://www.revenue.state.il.us). If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

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If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis  
Associate Counsel

MAJ:msk  
Enc.